Supreme Court of the United States.

No. 244. — October Term, 1902.

HORACE B. DUNBAR, Plaintiff in Error,
v.
LOTTIE E. DUNBAR, Defendant in Error.

IN ERROR TO THE SUPERIOR COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

STATEMENT OF THE CASE.

This case is before this court on a writ of error to the Superior Court of the Commonwealth of Massachusetts. The plaintiff in error was married to the defendant in error on or about Aug. 19, A. D. 1871, at Boston, Mass. (record report, page 13), and two sons, Harry H. and Willie W., were born of this marriage. At the trial of the case in said Superior Court it was admitted and agreed that a divorce was granted to the plaintiff in error from the defendant in error in Ohio (Rec., p. 13), after due proceedings in the courts of said State, on the ground of her desertion. This was a divorce absolute at the date of the decree, viz., Aug. 8, 1889.

The record of the divorce proceedings duly certified and authenticated was produced and put in evidence as set forth in the report of the case. (Rec., p. 13.) At that time Harry was twelve years of age and Willie nine years of age. After this divorce had been granted to the plaintiff in error, an agreement so called was executed by the plaintiff in error, to wit, on or about the fourth day of September, A. D. 1889, which agreement is Exhibit 1 of the report. (Rec., p. 44.) This so-

called agreement was given in pursuance of certain agreements and understandings had by the parties prior to the application of the plaintiff in error for his divorce, and for the purpose of securing the decree of divorce without a contest. See Exhibits 4, 5, 6, 7, 8 and 9. (Rec., pp. 46 to 49 inclusive.)

Payments under this so-called agreement being in arrears in 1896, and controversies having arisen over the agreement, a new agreement (Exhibit 2, Rec., p. 45) was executed by both parties in settlement of these controversies, and in substitution for the so-called agreement of 1889, the terms of which contract will be hereinafter more specifically recited. Payments under this contract were made by the plaintiff in error until some months prior to Dec. 2, 1898 (Rec., p. 15, near bottom), viz., until June, 1898. (Rec., p. 17.)

On Dec. 2, 1898, the plaintiff in error, who had been for many years a resident of Cincinnati, in the State of Ohio, was adjudged a bankrupt on his voluntary petition in the United States District Court in Bankruptcy, Southern District of Ohio, Western Division, and on April 24, A. D. 1899, was discharged from all debts and claims which were made provable by the Acts of Congress relating to bankruptcy against his estate, which existed on said second day of December, A. D. 1898 (Rec., p. 15), as appears from a certified copy of the bankruptcy proceedings, made a part of the defendant's answer (Rec., p. 15). In the bankruptcy proceedings the defendant in error was named as a creditor in the bankruptcy schedule for the amount due under the contract to the date of the petition and for the instalments to accrue in the year subsequent thereto (Rec., p. 16); she was given notice of the filing of the petition and of the first meeting of creditors; and she appeared by an attorney, who produced and filed his power of attorney duly executed, and filed her claim for six hundred ninety-one and 63/100 (691.63) dollars for instalments due to the date of the adjudication under the agreement of 1896. (Rec., p. 16.)

By the terms of this agreement the plaintiff in error agreed to pay to the defendant in error "during her life, or until

she marries, for her maintenance and support, yearly, the sum of five hundred (500) dollars, and will pay to her yearly for the support and maintenance of her child, Harry H. Dunbar, the sum of four hundred (400) dollars until he shall attain the age of twenty-one (21) years; and shall pay her yearly for the support and maintenance of her child, Willie W. Dunbar, the sum of four hundred (400) dollars until he shall attain the age of twenty-one (21) years, all said sums to be paid in equal monthly instalments between the first and tenth of each and every month." (Rec., p. 59.) Harry H. Dunbar became of full age in 1898, and Willie W. Dunbar became of full age on Jan. 26th, 1901, the latter thus being nearly nineteen years of age when the plaintiff in error was declared a bankrupt, and the defendant in error was forty-six years of age at this time.

This action was commenced by a writ sued out of the Municipal Court of the City of Boston on the second day of October, A. D. 1899, by virtue of which writ the plaintiff in error was arrested. The cause of action as set forth in said writ is as follows: "And the plaintiff says the defendant made a contract in writing, a copy of which is hereto annexed, marked 'A,' whereby the defendant promised to pay the plaintiff the sum of five hundred (500) dollars yearly for her support and maintenance, and four hundred (400) dollars yearly for the support and maintenance of her child Willie W. Dunbar." And plaintiff says the defendant owes her under said contract seven hundred and forty-nine and 90/100 (749.90) dollars, according to the account hereto annexed, marked "B." (Rec., pp. 61 and 62.)

ACCOUNT ANNEXED.

"B".

HORACE B. DUNBAR — BOSTON, Oct. 2, 1889.

To LOTTIE E. DUNBAR, *Dr.*

1. To instalments due under covenant for alimony from December, 1898, to Oct. 1st, 1899, ten months at $41.66 a month $416 60

2. To monthly allowance due her for support and maintenance of Willie W. Dunbar from December, 1898, to October 1st, 1899, ten months at $33.33 a month $333 30

3. Total $749 90

(Rec., p. 63).

After a trial in said Municipal Court for the City of Boston, the Court found for the defendant, the plaintiff in error here, and an appeal was taken by the defendant in error from said court to the Superior Court aforesaid. After full hearing by said Court without a jury, the Court refused to rule "that upon all the evidence the plaintiff (defendant in error here) is not entitled to recover," and ruled that as to so much of plaintiff's declaration as seeks to recover the sum of three hundred thirty-three and 33/100 (333.33) dollars, allowance due her for the support and maintenance of Willie W. Dunbar, the discharge in bankruptcy pleaded by the defendant, the plaintiff in error here, was a bar to her claim, and found for the plaintiff on the other item of said account.

At the request of the parties the case was reported to the Supreme Judicial Court, and by agreement of parties, if above rulings were right, judgment was to be confirmed; otherwise such judgment was to be entered as law and justice might require. (Rec., pp. 49 and 50.)

After full hearing on the report made by said Court, the Supreme Judicial Court for the Commonwealth, on Dec. 31, 1901, ordered that the clerk of the Superior Court for the County of Suffolk, in which county the cause was tried, make the following entry under said case in the docket of said court: "Judgment to be entered for the plaintiff (the defendant in error here) for both branches of her claim." (Rec., p. 11.) The rescript handed down by said Supreme Judicial Court stated as one of the grounds and reasons for the decision as follows: "Contingent claims are not provable under the bank-

ruptcy act of 1898, and hence no part of the plaintiff's claim is barred by the defendant's discharge." (Rec., p. 12.)

The opinion of said Supreme Judicial Court was rendered by Barker, J., who said in part: "The defendant's contentions are that his discharge in bankruptcy is a bar to the suit." . . .

"Whether the bankruptcy act of 1898 allows the proof of contingent claims must depend finally upon the construction of the statute by the Federal Courts. This court in Morgan *v.* Woodell, 178 Mass. 350, expressed the opinion that one class of contingent claims was not so provable, and in Goding *v.* Rosenthal (61 N. E. Rep. 222; 180 Mass. 43) followed that expression of opinion by a decision to the same effect. If claims of the nature then held to be not provable are not provable, we see no ground for holding either class of obligations imposed upon the defendant by his contract of 1896 to be provable. The result is that the defendant's discharge in bankruptcy was not a bar to either branch of the plaintiff's claim now in suit." . . . (Rec., pp. 10 and 11.)

In accordance with the order of said Supreme Judicial Court on the sixth day of January, A. D. 1902, in said Superior Court sitting in and for said Suffolk County, final judgment was entered for the plaintiff, the defendant in error here, in the sum of eight hundred fifty-one and 66/100 (851.66) dollars damages, and costs of suit taxed at sixty-seven and 18/100 (67.18) dollars. (Rec., pp. 5 and 6.)

On the first day of February, A. D. 1902, the defendant, the plaintiff in error here, filed his suggestion and notice of his intention to sue out a writ of error in the Supreme Court of the United States on the said first day of February. On petition therefor said writ of error was granted and issued by the Supreme Court of the United States accordingly. (Rec., pp. 6 and 12.)

ASSIGNMENT OF ERRORS.

1. The Supreme Judicial Court of the Commonwealth of Massachusetts erred in its finding, ruling and order that the discharge of the plaintiff in error in bankruptcy under the national bankruptcy law of 1898 did not operate as a full and complete bar to the right of the defendant in error to recover on her claim in respect to and as a release from

(*a*) Instalments due to said defendant in error for the support and maintenance of said defendant in error;

(*b*) Instalments due for the support and maintenance of Willie W. Dunbar, the son of the defendant in error;

in consequence of which final judgment in the Superior Court sitting for Suffolk County in said Commonwealth was entered for said defendant in error.

2. The Supreme Judicial Court of said Commonwealth erred in its finding, ruling and order that the claim of the defendant in error was not a debt provable in the bankruptcy proceedings of the plaintiff in error, from which he was released by his discharge in bankruptcy, in consequence of which final judgment in the Superior Court sitting for said Suffolk County was entered for said defendant in error.

3. The Supreme Judicial Court erred in its finding, ruling and order that the obligations imposed upon the plaintiff in error by his said contract of 1896 were contingent claims within the meaning of the national bankruptcy law of 1898, both as to

(*a*) Instalments due to defendant in error for her support and maintenance, and

(*b*) Instalments due to the defendant in error for the support and maintenance of her son Willie W. Dunbar.

In consequence of which final judgment in said Superior Court was entered for the defendant in error.

BRIEF OF THE ARGUMENT.

Points and Authorities.

I.

The sole question raised by this writ of error is whether the discharge of the plaintiff in error granted under the National Bankruptcy Act of 1898 is a bar to the claim of the defendant in error for instalments which have accrued subsequent to the adjudication in bankruptcy under the contract upon which she rests her demand.

By Section 4 of the Bankruptcy Act "Any person who owes debts, except a corporation, shall be entitled to the benefits of this act as a voluntary bankrupt." The act further provides in Section 1 that "discharge" means "release of a bankrupt from all debts which are provable in bankruptcy except such as are excepted by this act"; and includes, in Section 63, among the debts which may be proved against his estate, —

"(1) A fixed liability as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not," and debts "(4) founded upon a contract express or implied."

It is further provided by Section 63 of the Act, that (*b*) "unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct and may thereafter be proved and allowed against his (the bankrupt's) estate."

And a "debt" is defined in Section 1 (11) to include "any debt, demand or claim provable in bankruptcy."

It is contended by the plaintiff in error that the claim of the defendant in error is a provable debt within the meaning of the sections just set forth.

(*a*) As the defendant in error was properly scheduled as a

creditor of the plaintiff in error in his bankruptcy petition, and as she had full notice of and appeared by attorney in the bankruptcy proceedings, her claim for future instalments under the agreement is barred if a provable debt, whether it was actually proved or not.

No recovery can be had in a State Court, on a debt that was provable against an estate in bankruptcy after the debtor has obtained a discharge under the national bankrupt law, whether proved or not, unless the debt in question belonged to one of the excepted classes.

Talbot *v.* Suit, 68 Md. 443; s. c. 13 Atlantic Rep. 356.
Withers *v.* Stinson, 79 N. C. 341.
Miller *v.* Chandler, 29 La. Ann. 88.
Mace *v.* Wells, 7 How. 172.

The defendant in error's claim does not fall within the classes of claims which are excepted by the act.

II.

It seems proper, before entering upon a discussion of the real controversy in this case, to consider the contention of the defendant in error as to the nature of her claim; viz.: that this claim is to be treated as alimony and based on a covenant made in lieu of alimony.

In the first place it is seriously doubted if any question as to the nature of this claim is open to review here. The errors which this court are asked to correct are those of the Supreme Judicial Court of Massachusetts in its construction of the Bankruptcy Act as applied to what that court has found to be a contract of an ordinary kind. That court has already construed the agreement in suit against the contention there made that it was alimony or a covenant for alimony. It is respectfully submitted that such a construction is conclusive on that question and that it is not open to this court to hold this agreement a covenant for alimony or alimony.

III.

But if the question is open to this court, then the plaintiff in error contends that the claim is not one for alimony, nor can it be treated as a covenant for alimony or in lieu of alimony with respect to the operation of a discharge in bankruptcy.

Alimony means decree for alimony, a judicial debt without the ordinary incidents of a contract.

As this Court said in Audubon *v.* Shufeldt, 181 U. S., at page 577, "Alimony does not arise from any business transaction, but from the relation of marriage. It is not founded on contract, expressed or implied, but on the natural and legal duty of the husband to support the wife. The general obligation to support is made specific by the decree of the court of appropriate jurisdiction. Generally speaking, alimony may be altered by that court at any time as the circumstances of the parties may require. . . . Permanent alimony is regarded rather as a portion of the husband's estate to which the wife is equitably entitled than as strictly a debt. . . ."

In re Nowell, 99 Fed. Rep. 931.

In Parsons *v.* Parsons, 9 N. H. 309, it was held that the term "alimony" meant the allowance made to a wife upon a divorce. And in Campbell *v.* Campbell, 37 Wisc. 206, it was held that alimony was not in itself an asset in the technical legal sense of that word, nor was it a charge "upon the husband's estate (if he has one), but is a mere personal charge upon, or duty of, the husband."

In Taylor *v.* Taylor, 93 N. C. 418, it was held that alimony is that portion of the husband's estate which is alloted to the wife for her support during the period of a judicial separation. It was held in Kinney *v.* Kinney, 1 Blackf. 481, that alimony was a term generally used to denote the portion allotted to a divorced wife out of a husband's property.

Further, it is held in most jurisdictions that alimony can only be obtained by decree on the granting of a divorce.

Darrow *v.* Darrow, 43 Iowa, 411.
Burrows *v.* Purple, 107 Mass. 428.
Fischli *v.* Fischli, 1 Blackf. 360.
Heyob *v.* Her husband, 18 La. Ann. 41.
Moore *v.* Moore, 18 La Ann. 613.
Shatwell *v.* Shatwell, 1 Smedes & M. Ch. 51.
Bowman *v.* Worthington, 24 Ark. 522.
Doyle *v.* Doyle, 26 Mo. 545.

The allowance of alimony, its amount and the time of its payment, are all within the discretion of the Court.

Bergen *v.* Bergen, 22 Ill. 187.
McDonough *v.* McDonough, 26 How. Prac. 193.
Jolliff *v.* Jolliff, 32 Ill. 527.
Brown *v.* Brown, 24 S. E. 238.
Call *v.* Call, 63 Me. 407.
McCarthy *v.* McCarthy, 143 New York, 235.
Downs *v.* Flanders, 150 Mass. 92.

Where the husband, as in this case, obtains a divorce for his wife's misconduct or fault there is a presumption that the wife is not entitled to alimony.

Perry *v.* Perry, 2 Barb. Ch. 311.
Spitler *v.* Spitler, 108 Ill. 120.
Am. and Eng. Encycl. of Law, 2d Ed., Vol. 2, p. 118.

The contract in this case was made many years after the divorce had been granted to the plaintiff in error, at a time when both parties were free and competent to contract as fully and completely as any individuals might do. It has not been contended, and there is absolutely no evidence, that the defendant in error sought or had any right to obtain alimony, and if she has any right to alimony this agreement in no way prevents its exercise by her. The Court which granted the divorce made

no decree with respect to alimony; it did not pass upon this contract nor any agreement into which these parties entered.

This is a case arising out of a contract which bears no relation to the question of alimony and cannot be so treated. Furthermore, the pleadings in the case show that it is treated purely as a contract by the defendant in error in bringing this action, and in the entire course of this litigation the agreement in suit is treated merely as a contract by all the courts of the Commonwealth of Massachusetts.

The provision made in this agreement for the support and maintenance of the son, Willie, is an essential part of the agreement, but it is in no sense a provision for alimony.

We are concerned, then, with the effect of a discharge in bankruptcy on a contract which is in in its nature a covenant not for alimony but for annuities.

IV.

The instrument upon which the present action is founded may be properly characterized as a covenant for annuities.

An annuity is defined to be "A yearly sum stipulated to be paid to another in fee for life, or years, and chargeable on the person of the grantor."

Black's Law Dictionary, p. 74.
Bouvier's Law Dictionary, Vol. 1, p. 144.
Co. Lit. 144 B.
Turrentine *v.* Perkins, 46 Ala. 631.
Booth *v.* Ammerman, 4 Bradf. Sur. 132.
Pearson *v.* Chase, 10 R. I. 455.
Holbrook *v.* Comstock, Admr., 16 Gray, 109.
Shrover *v.* Myrick, 4 Ind. App. 7.

An annuity may be created by contract.

Cox *v.* Maxwell, 151 Mass. 336.
Turrentine *v.* Perkins, 46 Ala. 631.

In Holbrook *v.* Comstock, Admr., 16 Gray (Mass.) 109, agreements which were in the form of bonds provided for the separation of the plaintiff and his wife, for the care, custody and maintenance of their children, for a division of property between them, and for the right to the wife to enjoy her property and dispose of it, whether given to her or earned by her, as if she were a *feme sole*. By the award of certain referees under these agreements the plaintiff was to pay the wife "fifteen dollars quarterly as long as the decision of the arbitrators should remain." The Court held that although the agreement provided that the arbitrators should award and determine "what allowance shall be made and paid by the said W. to the said A. by way of *alimony* for her support and maintenance, etc.," yet the word "alimony" was not used in its technical signification. That the allowance was to be received by the wife "rather as an annuity than as alimony."

In the case at bar the covenant of the plaintiff in error was a personal one and the obligations created by it were for the payment of stipulated yearly sums for certain periods of years, in the one case for life or until marriage, in the other during minority. It is difficult to conceive of a plainer case of the creation of annuities than that presented by this contract.

V.

The contract in this case is an entire contract, although it is one the performance of which on the part of the plaintiff in error required him to make various payments at various times. The consideration moving from the defendant in error was an entirely executed one. The only acts to be done were those to be performed by the plaintiff in error.

Schell *v.* Plumb, 55 N. Y. 592.

Kirkland *v.* Oates, 25 Ala. 465.

Lucesco Oil Co. *v.* Brewer, 66 Pa. St. 351.

Shaffer *v.* Lee, 8 Barbour, 412.

Wiggins *v.* Keizer, 6 Ind. 252.

In Schell *v.* Plumb, 55 N. Y. 592, it was held that an agreement to support one during life was an entire continuing contract.

A contract to be held severable must embrace several undertakings, each supported by a distinct consideration. It is one divisible in its nature and purposes, *i. e.*, susceptible of division and apportionment where the matters and things contemplated and embraced by it are not necessarily dependent upon each other, nor intended by the parties so to be.

Wooten *v.* Walters, 110 No. Car. 251.

Keeler *v.* Clifford, 165 Ill. 544.

Coos Bay Wagon Co. *v.* Crocker, 4 Fed. Rep. 577.

While the contract here is entire, yet the performance is divisible; so the claim of the defendant in error is based upon two distinct and independent obligations: one the obligation to pay the annual sum stated in monthly instalments to the defendant in error during her life or until she married; the other to pay another stated annual sum in monthly instalments to the defendant in error for her child, Willie, until he shall attain the age of twenty-one years. In this respect the agreement of the plaintiff in error imposed upon him two distinct duties of different limitations, one as to the defendant in error, another as to the son.

It is to be remembered that the defendant in error has thus treated the contract, as is shown by the form of the declaration and the separate items in the account (Rec., pp. 61–63); that the Superior Court thus treated it in its finding (Rec., pp. 49, 50), and the Supreme Judicial Court in its decision (Rec., p. 11).

VI.

The plaintiff in error submits that this claim, founded upon an express contract, is provable and barred by his discharge, because it can be liquidated within the meaning of Section 63, subdivision *b* of the Bankruptcy Act.

It is to be observed that the word "debt" is not given a confined and limited meaning in the act, but "shall" include any debt, demand or claim provable in bankruptcy, and this broad signification of the term "debt" is recognized in subdivision *b*, Sect. 63, by the provision that unliquidated *claims* may be liquidated as the court may direct and thereafter proved and allowed against the bankrupt's estate.

In re Hilton, 4 American Bankruptcy Reports, 774.

A.

The term "demand" is of much broader import than "debt," while the word "demand" is one of art of an extent greater than any other word in the law, except "claim." Co. Litt. 291 b.; 3 Co., by Thomas, 427. Vedder *v.* Vedder, 1 Denio, 257 (N. Y.)

In Denny *v.* Manhattan Co., 2 Hill (N. Y.), 223, the Court said that "it is clear that the term 'demand' is of much broader import than 'debt' and would embrace rights of action belonging to the debtor beyond those which could appropriately be called debts. In this respect, the term *demand* is one of very extensive import — among the most so, indeed, of any that are known to the law."

Hubbard, J., in Gray *v.* Bennett, 3 Mete. (Mass.) 522, 526.

Jemison *v.* Blowers, 5 Barbour (N. Y.), 686.

If, therefore, the claim in this case might be in any event a provable claim, then the defendant in error is bound to regard it as such and apply to the Court, pursuant to Section 63, subdivision *b*, to have it liquidated or abide by the consequences of her failure to do so.

As the Court said in *re* Hilton, 4 Am. B. R. 774, "I cannot doubt that the intent of these words, 'claim provable in bankruptcy' [Sect. 1, (11)] was to include every claim that under the provisions of the bankruptcy act *might be made provable;* and the definite provision of Section 63, *b*, for making unliquidated claims provable is, I think, precisely what is intended to be included in those words as distinguished from those words as 'debt.'"

If the claim in that case could be made provable, as the Court there held, then the claim in this case could be made provable.

Let us assume that the plaintiff in error had, instead of reverses which led to his bankruptcy, come into great wealth, so that he was well able to meet the demands of this contract; that he then notified the defendant in error that he repudiated the agreement, which he had made with her, and refused to be longer bound by it.

The right to break the contract cannot be denied him. Under such circumstances, what could the defendant in error do?

Unquestionably she was entitled to treat this agreement as absolutely broken, and bring suit immediately to recover in damages all that she had suffered by reason of the breach of the agreement as an entire contract.

In other words, she would not be compelled to await the time for the payment of each monthly instalment to arrive before she could bring her action and thus have to resort to endless litigation to secure her rights on the contract, but could elect to treat the agreement as terminated by the action of the plaintiff in error and have her damages assessed once and for all.

The Court would, in such a case, be compelled to liquidate her claim, and so far from finding it impossible, would find it no more difficult to accomplish than in many cases which are regularly presented to courts of law for adjustment.

U. S. *v.* Behan, 110 U. S. 338.
Pierce *v.* Tennessee Coal, etc., Co., 173 U. S. 1.
Roehm *v.* Horst, 178 U. S. 1.
Marks *v.* Van Eeghen, 85 Fed. 853.
In re Stern, 8 Am. B. R. 569.
Parker *v.* Russell, 133 Mass. 74.
James *v.* Allen County, 44 Ohio St. 226.
Eastern Tenn., etc., Railroad *v.* Staub, 7 Lea. 397.

Now this right of election, if it may be so called, may be exercised where bankruptcy intervenes. Repudiation of the contract, not only by the act of bankruptcy, but also by the

schedule naming the defendant in error as a creditor and by the notice given her, is as fully communicated as is repudiation in the case supposed above. And in this case, for more than six months prior to his bankruptcy, the plaintiff in error had utterly failed and refused to meet the obligations of the contract.

The contract in *re* Hilton, *ubi supra*, was for service at a stipulated salary for a term of years. The continuation of the contract was dependent upon the life of the party who was to render the service, so that in this respect the value of the contract to the parties at any given time prior to its termination by its own limitation was dependent upon the ability of one party to furnish the service, which was to be the consideration for the payment of the stipulated amounts, as salary, by the other party to the agreement. In other words, the agreement was executory on both sides. Yet these uncertainties or contingencies, if such they were, did not take the claim out of the operation of the bankruptcy law.

In the case at bar the consideration on the one hand was executed and executory only on the other. There was less uncertainty than in *re* Hilton. The period was as definitely fixed, having regard to life tables, so far as the life of the wife and the minority of the boy were concerned, and the sum to be paid was as certain in amount, as in *re* Hilton. That case, it is urged, is exactly analogous to the present case, so far as the instalments to be paid on account of the son is concerned. And in that case the right of election, so far as such a right existed, was exercised against treating the bankruptcy as a total breach of the contract, but inasmuch as the creditor might have so treated it, the Bankruptcy Act compelled it to be so treated and made it a provable debt.

Any other construction of the Bankruptcy Act would subvert its primary purpose to relieve insolvent debtors from their pecuniary liabilities as well as to secure ratable distribution of their assets among their creditors.

Moch *v.* Market St. Nat'l Bank, 107 Fed. R. 897.

Assume that claims of this nature are not provable because of this option given the creditor to treat the contract as broken once for all, or as continuing despite the bankruptcy, and we shall have a class of creditors who might, immediately after the proceedings of the bankrupt debtor were at an end and when presumably he was without resources, elect to treat the contract as broken and proceed to a recovery in damages for the full measure of the entire contract, and thus secure a judgment which would embarrass the debtor until paid or barred by new proceedings in bankruptcy.

The Bankruptcy Act, to accomplish its purpose, compels the creditor to elect to treat the contract as broken, and to prove his claim for the entire damages suffered by breach of it.

Ex parte Pollard, 2 Lowell, 411.

The contention here made finds strong support in the decisions made under the Act of 1841, where the language of the act was that persons having uncertain and contingent demands against the bankrupt "shall be *permitted* to come in and prove such debts and claims." It has been held under that act that creditors holding such demands were compelled to prove their claims, and that the discharge was a bar to such claims.

Mace *v.* Wells, 7 Howard, 172.

Jemison *v.* Blowers, 5 Barbour (N. Y.), 686.

The decisions in Hochster *v.* De La Tour, 2 El. & Bl. 678, and the cases confirming it, rest upon the ground that it is against public policy, and creates a hardship upon the party injured by the breach of a contract to compel him to withdraw himself from productive enterprise and await the time for final performance before his right of action upon it accrues.

But it is equally hard, where the contract calls for performance by instalments, to compel the injured party to await the successive failures and bring successive actions to recover for each as a separate breach.

A doctrine of law that promoted litigation by compelling a suit for each of a series of breaches of one contract is recognized

by the later decisions as serviceable neither to the public, nor to the injured party. Hence, the rule of damages in actions of contract has gravitated toward the rule of damages in actions of tort.

In Pierce *v.* Tennessee, etc., Railroad Co., 173 U. S., 1., this Court, after stating the old rule of damages in tort, said: "But the recent tendency of decisions in this country, in actions of contract as well as in actions of tort, has been towards allowing entire damages to be recovered once for all in a single action, and thus avoiding the embarrassment and annoyance of repeated litigation. This especially appears in well-considered opinions in cases of agreements to *furnish support* or to pay wages."

The rule laid down by this Court in that case gives the injured party his full measure of compensation, and levies upon the party in fault no greater burden than is necessary to furnish this recompense.

The party at fault is entitled to consideration, and in Tarbox *v.* Hortstein, 4 Baxt. (Tenn.) 78, the Court considers the question from that point of view. In that case a contract provided for stipulated wages for a stipulated period. Suit was brought and recovery had for the wrongful discharge of the plaintiff and damages were awarded for the amount which had accrued up to the time of the suit; later several more suits were instituted, the purpose being to sue for each week's wages for the balance of the contract period of employment. The Chancellor perpetually enjoined these later suits and the Supreme Court approved his action. The Court said: "There was but one breach, and the recovery in the first suit was an adjudication and recovery for such breach, and concluded the defendant from another recovery for the same cause of action. The Chancery Court clearly had jurisdiction of the case, in order to prevent vexatious as well as continued and repeated threatened litigation. According to the view of the defendant, twelve petty, but annoying yet unfounded suits, were to be brought

against the complainants, the expense of which might have been equal to more than the amount with costs."

The doctrine that all contracts have a present value to each party and such present value is the claim which each has against the other, lies at the bottom of suits for anticipatory breach and works justice to all parties.

In the case at bar there is an especial reason for the application of this doctrine.

The plaintiff in error is a bankrupt, and the law seeks to relieve him from the burden of his obligations. It would be strange if full relief should be denied because of a theory which considered only the hardship to the injured party, and thus permitted to remain upon the party in fault the very burdens from which the law would, otherwise, relieve him.

If the defendant in error had brought suit when the plaintiff in error defaulted on his first payment, or at the time of his bankruptcy, then in the language of this Court in Pierce *v.* Tennessee Coal, etc., Co., she could have recovered "the value of the contract to" her, "at the time of the breach, including all damages past or future resulting from a total breach of the contract."

She could recover thus only because the contract then had a present value to her that was capable of ascertainment; and such are the very claims from which the Bankrupt Act relieves the plaintiff in error.

VII.

"As a general rule every debt recoverable at law or in equity is provable."

Re Jordan, 2 Fed. R. 319.

It is certain that a bankruptcy act may be so framed as to avoid and annul all contracts existing at the time of the bankruptcy, whether the liability of the bankrupt at the time upon such contracts be certain or contingent.

Skelton *v.* Pease, 10 Mo. 478.

As this statute expressly makes the word "debt" equivalent to the terms "demand" and "claim," wherever used in the act, it is to be observed how broadly the language used in clause 4 of Section 63, subdivision *a*, permits the discharge of the bankrupt to operate.

If claims ordinarily termed contingent are provable in bankruptcy, under the broad provisions of this clause of the act, then effect is given to paragraph *b*, which provides for their liquidation. Otherwise, this paragraph can have but little meaning and effect.

If a claim is certain and fixed as to the time and amount, then it is liquidated, and provision for its liquidation is unnecessary and uncalled for.

Paragraph *b* does not enlarge the class of debts which may be proved, but provides that claims within the scope of paragraph *a*, if unliquidated, may be liquidated and proved.

A debt is liquidated when it is certain what is due and how much is due.

Bouvier's Law Dict., Vol. 2, page 263.

It is significant in this connection that in Section 19 of the Act of 1867, the term "liquidation" is applied to contingent debts. By Section 5 of the Act of 1841, it was that class of persons who were annuitants and holders of debts payable in future, *i. e.*, having uncertain and contingent demands, who might have the value of such claims ascertained under the direction of the Court.

Lowell, Treatise on Law of Bankruptcy, page 485.

And the ground upon which uncertain or contingent debts under the early English bankrupt laws and the United States law of 1800 were excluded, was that no mode was provided for their liquidation.

Jemison *v.* Blowers, 5 Barbour (N. Y.), 686.

The Bankrupt Act of 1800 contained no provision for the proof of unliquidated or contingent debts or claims. The Act of 1841 specifically provided for the proof of annuities and uncertain and contingent demands, and the Act of 1867 was even more specific in providing for proof in all cases of contingent debts and contingent liabilities contracted by the bankrupt.

However, the omission of these special provisions found in earlier acts, for the proof of such debts and liabilities, is of the greatest significance where words are found, as in the present case, so general that they necessarily include the particular provisions embraced in prior legislation. It points clearly to the intention on the part of Congress to sweep away the phraseology by which in former acts the various claims and liabilities therein mentioned were made provable, and to substitute therefor such concise yet comprehensive language as would accomplish the same purpose. Such words as those contained in clause 4 of Section 63, *a*, are of such large import as fairly to embrace claims of the character specifically mentioned in the Act of 1867.

A clause similar to clause 4 is not to be found in any of the earlier enactments, but it is highly probable, in view of the history of bankruptcy legislation in this country, that by the comprehensive language of this clause, it was the intention of Congress to bring within the operation of the present act all of the classes of claims which were specifically mentioned in the earlier laws.

It is to be observed that the undoubted trend of legislation of this character has been to broaden the operation to a discharge in bankruptcy. In this respect the Act of 1841 was a distinct advance over the Act of 1800, and the Act of 1867 was more extensive in its operation than the Act of 1841.

So in England successive statutes have continually enlarged the class of debts which may be proved in bankruptcy.

Lowell on Law of Bankruptcy, Sect. 164.

Now, then, we find the word "debt" in this act so defined as to give it the broadest possible signification, and we find it stated that all debts founded upon contracts, expressed or implied, are provable in bankruptcy, and that unliquidated claims may be liquidated under the direction of the Court.

Can it be said that Congress intended to withdraw from the operation of the present act a large class of claims from which it is the policy of all modern bankruptcy laws to free a debtor, when language is used broad enough to permit them to be embraced in the act, merely because they were not specifically mentioned?

It is the purpose of bankruptcy laws to terminate all the contractual relations of the bankrupt.

Lowell, Treatise on the Law of Bankruptcy, page 486.

Nor can it be fairly urged against this contention that clause 4 is dependent upon or to be governed by clause (1) of subdivision *a*, Section 63. On the face of the act they are distinct and independent provisions, and reasonable effect can be given to both by treating them as separate and independent clauses.

Moch *v.* Market St. Nat'l Bank, 107 Fed. Rep. 897.

Therefore, even if the claim of the defendant in error in this case is a contingent one, it is provable under this clause of the act and can be liquidated.

It has been frequently determined that claims of a character similar to the one in suit can be liquidated, and that the discharge in bankruptcy is a bar to recovery upon them. The test laid down in this court with respect to the proof of this class of claims is the possibility of their estimation or valuation.

Riggin *v.* Maguire, 15 Wall. 549.

And it is considered by Judge Lowell in his work on Bankruptcy, Section 167, page 126, that this is the true test.

A bankrupt is released by his discharge from further liability on a covenant for quiet enjoyment, although no breach occurred before bankruptcy.

Jemison *v.* Blowers, 5 Barbour (N. Y.) 686.

A claim upon a bond conditioned on the payment of all the debts of a firm by the continuing partner, where no debts were paid by obligee until after bankruptcy, was "capable of approximate proof," and barred by a discharge of the obligor in bankruptcy.

Fisher *v.* Tifft, 12 R. I. 56.

The obligation to pay an annuity for life by quarter yearly instalments was discharged by bankruptcy of the obligor. With respect to payments which might become due after the petition in bankruptcy was filed, the present value of the liability was ascertainable and provable.

Haywood *v.* Shreve, 44 N. J. Law, 94.

The liability of a subscriber to corporate stock for his unpaid subscription was a provable debt under the Bankrupt Act of 1867, although no assessment had been made at the time of bankruptcy.

Glenn *v.* Abell, 39 Fed. R. 10.

A claim based on a contract right, although for unliquidated damages for loss of future profits, is provable in bankruptcy.

Matter of Manhattan Ice Co., 7 Am. B. R. 408.

In re Stern, 8 Am. B. R. 569.

Claim based on a bond to secure the payment of an annuity to a wife for life held to be provable in bankruptcy. "The payment is clearly one the value of which can be ascertained."

Cobb *v.* Overman, 109 Fed. R. 65.

"Liabilities involving payment or the ceasing to pay at the end of a life or lives in being can always be valued by the

tables of actuaries." Lowell, Treatise on Law of Bankruptcy, 131.

Lowell *v.* St. Louis Life Ins. Co., 111 U. S. 264.
Pierce *v.* Tenn. Coal, etc., Co., 173 U. S. 1.
Parker *v.* Russell, 133 Mass. 74.
Schell *v.* Plumb, 55 N. Y. 592.
Haywood *v.* Shreve, 44 N. J. L. 94.
Cobb *v.* Overman, 109 Fed. 65.
Shrover, Adm., *v.* Myrick, 4 Ind. App. 7.
Ex parte Granger, 10 Ves. 348.
Ex parte Tindal, 1 Dra. & Ch. 291.
Ex parte Bradley, 2 M. D. & De G. 524.
Ex parte Naden (1874), L. R. 9 Ch. 670.

In the Collateral Inheritance Tax Act of Massachusetts, St. 1891, Chap. 425, Sect. 13 (Chap. 15, § 16. Revised Laws), we find a rule laid down for calculating annuities. It is as follows: "The value of an annuity or life estate shall be determined by the actuaries' combined experience tables, and four per cent compound interest."

It is perfectly clear, then, that so far as the liability of the plaintiff in error is one dependent upon the minority of the son and the life of the wife, the case presents a question upon which the law is well settled.

VIII.

But the liability of the plaintiff in error to pay under his covenant "until she marries" raises a question not wholly free from difficulty.

The courts of this country have not dealt with this contingency, so far as search has revealed, but in England this question has been determined and such a liability has been held to be discharged in bankruptcy.

Ex parte Blakemore, 5 Ch. D. 372.
Ex parte Neal *re* Batey, 14 L. R. Ch. Div. 579.

Ex parte Blakemore, 5 Ch. D. 372 (1887), was a case where there was a covenant to pay an annuity during life or widowhood. It was held that the chance of a widow marrying again was not incapable of liquidation and on bankruptcy a provable claim arose upon the covenant. Lord Justice James said: "No doubt it is uncertain whether the appellant will marry again, just as the duration of a particular life is uncertain. I am of the opinion that we cannot judicially declare that this contingency is incapable of being fairly estimated. Like every other contingency affecting human life or human conduct, it is, I think, capable of calculation."

Ex parte Neal, *ubi supra*, was a case where it was held that the value of an annuity dependent upon three different contingencies, viz., chastity, resumption of cohabitation, or dissolution of marriage for the fault of annuitant, was provable in bankruptcy.

The defendant in error was, at the date of the adjudication in bankruptcy, about forty-six years of age, and the probable duration of her life was legally ascertainable. So the maximum of value to her of this covenant when the plaintiff in error was declared a bankrupt was fixed. The uncertainty of widowhood would diminish, not increase, this value. If, then, the greater sum is calculable, why not the lesser? The uncertainty in the one case is no more complete than in the other. If the bankrupt law can relieve him of the burden of one element of this covenant, it can and should of the other. The hardship to the other creditors is no greater than upon many claims the liquidation and proof of which are undoubted.

Lowell, Treatise on Law of Bankruptcy, Sect. 171, p. 130.

Jemison *v.* Blowers, 5 Barbour (N. Y.) 686.

Moch *v.* Market St. National Bank, 107 Fed. Rep. 897.

Matter of Manhattan Ice Co., 7 Am. B. R. 408.

Fisher *v.* Tifft, 12 R. I. 56.

IX.

The claim of the defendant in error was a fixed liability evidenced by an instrument in writing, absolutely owing by the plaintiff in error at the time he filed his petition in bankruptcy, though not then payable, and therefore within the meaning of clause 1 of subdivision *a*, Sect. 63.

While claims of this character have been generally treated as contingent, yet it is submitted that within the meaning of the clause just cited this claim is not contingent.

Looking at the obligations of the plaintiff in error from the point of view of his performance of them we find no contingency, but an absolute fixed liability extending into the future.

It is not a case where it is uncertain when his liability will come into existence, but a case where it is uncertain when it shall cease. Death, marriage, and majority are events which terminate the liability, not create it. It seems to be an erroneous conception of the term "contingent" which has led to treating claims arising upon covenants for annuities as contingent demands.

Payment under this contract was not dependent upon the happening of an event which might never occur.

Wolf *v.* Stix, 89 U. S. 1.

"The word 'contingent,' when applied to a use, remainder, devise, etc., or other legal right or interest, implies that no present interest exists, and that whether such right or interest ever will exist depends upon a future uncertain event." "The term 'contingent demand' would, therefore, be inapplicable where a present claim exists or where it is certain to arise in future, and is only appropriate when there is no claim *in presenti*, and when it is uncertain whether any in fact will arise."

Jemison *v.* Blowers, 5 Barbour (N. Y.) 686; 1 Coke, Thomas' Ed. 121; Comyn's Dig. Tit. Uses, K. 6; 1 Coke, Rep. 30; 2 Comyn, 169.

In Riggin *v.* Maguire, 15 Wall. 549, Mr. Justice Bradley said

that the covenant sued on "did not come within the category of *annuities and debts payable in future, which are absolute existing claims.*" "If it had come within that category, the value of the wife's probability of survivorship after the death of her husband might have been calculated on the *principle of life annuities.*"

As the claim in the case at bar is for annuities, it is an absolute existing claim. It can be liquidated as provided in subdivision *b*, Sect. 63.

X.

The agreement in suit, in so far as it provided for the payment of a certain yearly sum by monthly instalments for the support and maintenance of the son until he shall attain the age of twenty-one years, did not impose a contingent liability on the plaintiff in error. The payment was to cease at a definite fixed time, *i. e.*, when the boy reached the age of twenty-one years. The liability was absolute. At the time of the adjudication in bankruptcy of the plaintiff in error the boy was nearly nineteen years of age, and before the bankruptcy proceedings would, in the regular course, be terminated, the boy would be nearly twenty years of age. It cannot be doubted that the claim of the defendant in error in respect to this part of the contract could be liquidated and proved in bankruptcy. It is therefore, barred by the discharge.

Ex parte Pollard, 2 Lowell, 411.
Riggin *v.* Maguire, 15 Wall. 549.
Cobb *v.* Overman, 109 Fed. R. 65.

In *ex parte* Pollard, 2 Lowell, 411, the bankrupt had agreed to employ one for ten years at a yearly salary, and it was there held that the employee might prove for damages for the breach of the contract caused by the filing of a voluntary petition in bankruptcy by the employer. Judge Lowell said: "One word as to the point that there is some contingency in this contract. I cannot see any. It is an absolute contract for employment, having a determined period and a fixed compensation. *The*

contingent liabilities which the court have always refused to assess are those im which it is uncertain whether there will ever be anything to assess. It is no objection to a proof that the Court or jury may findl difficulty in assessing damages for an absolutely broken contract any more than that there may be complications in an account. If the liability is absolute, there is no more or less difficulty in liquidating it and no less obligation to liquidate it than in any other."

XI.

The instalments for which the defendant in error seeks recovery in this suit are those which accrued from December, 1898, to September, 1899, inclusive, and were therefore instalments which became due within the year after the date of the adjudication.

These instalments accruing within one year after the time of bankruptcy were specifically set forth in the schedule of the debts of the plaintiff in error (Rec., p. 16). The defendant in error had full notice of this when she appeared and proved her claim.

Having voluntarily submitted her claim to the jurisdiction of the bankruptcy court, even if the claim were not provable within the act, the defendant in error is now estopped from saying that the claim was not within the act. She has waived the privileged character of her claim and has determined, by proving for a part of her claim, to come into tho bankruptcy court and obtain her dividend with other creditors as she had a right to do. She cannot now be allowed to insist upon the exemption of her claim from the effect of a discharge.

In this respect the status of the claim is like that of a fiduciary debt. It has been held that if a fiduciary creditor prove his debt, he shall be bound by the discharge.

Chapman *v.* Forsyth, 2 How. 202.
In re Tibbetts, Fed. Cases No. 13817.
Morse *v.* Lowell, 7 Metc. (Mass.) 152.

Burpee *v.* Sparhawk, 108 Mass. 111.
Fisher *v.* Currier, 7 Metc. (Mass.) 424.

The principle laid down by these cases is stated in Fisher *v.* Currier to be that if creditors of this class take the benefit they shall take it with the corresponding burden which the same law that gives it imposes.

Furthermore, in such a contract as the one in this case, there can be but one recovery, as there is but one breach. The plaintiff in error disabled himself by bankruptcy from performing his contract.

In re Swift, 7 Am. B. R. 374.

In fact, long before his bankruptcy he had ceased to make the payments required by the contract. This repudiation of his obligations was communicated to the defendant in error, and she acted upon it by proving for her claim in part. She was entitled and compelled, because of this breach of the entire contract, to have her entire damages assessed at once, and having sought to recover on her demand she must be held to have waived all right to claim for a greater sum than that for which she proved in bankruptcy.

James *v.* Allen County, 44 Ohio St. 226.
Wrubel *v.* Muth, 11 C. C. (Ohio) 559.
Tarbox *v.* Hartstein, 4 Baxt. 78.
Fish *v.* Foley, 6 Hill, 54.

XII.

While relieving the plaintiff in error from the pressure of existing obligations, yet the bankruptcy law divested him of all of his estate to be distributed to his creditors.

In doing so it leaves him to make a fresh start, but without resources.

It is manifestly an injustice which this Court should not construe the law to inflict without the plainest direction, if obligations like those in this case remain to burden the debtor.

It is not contended that a discharge in bankruptcy can relieve the plaintiff in error from any natural duty to the defendant in error or her son, if such a duty existed, but it is maintained that from the obligations of this particular contract the bankruptcy law has freed him.

Respectfully submitted,

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